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No. 71-183

In the Supreme Court of the United States

OCTOBER TERM, 1971

THE AGUA CALIENTE BAND OF MISSION INDIANS, ET AL., PETITIONERS

v.

THE COUNTY OF RIVERSIDE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

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MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

This memorandum is submitted in response to the Court's order of October 12, 1971, inviting the Solicitor General to express the views of the United States in this case.

1. The petitioners in this case are the tribal council of the Agua Caliente Band of Mission Indians and allottees of the tribal lands individually and on be-

half of all allottees. All of the lands in question are part of the Agua Caliente Reservation established by the Mission Indian Relief Act of 1891, 26 Stat. 712, and the Executive Order of President Taft, January 5, 1911, allocating land to the Agua Caliente Tribe (Pet. 2, 3, App. A).[1] The allotments were made under the combined authority of the Mission Indian Relief Act and of the General Allotment Act of 1887, as amended by the Act of June 25, 1910, 36 Stat. 859, 25 U.S.C. 331 *et seq.*[2] This Court had occasion to consider the laws establishing this reservation and the rights of individual members of the Tribe to allotments in *Arenas* v. *United States*, 322 U. S. 419, 420-425. See also the decision on remand, 158 F.2d 730 (C.A. 9).

All of the unallotted land is, under the Relief Act and the executive order, held by the United States "in trust, for the sole use and benefit of the band or village to which it is issued" under the charge to return the land to the beneficiaries "discharged of said trust, and free of all charge or incumbrance whatsoever" (Relief Act, Sec. 3, Executive Order Pet. App. A).

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[1] The parties have stipulated that the lands are part of a Reservation established by Executive Order (Tr. 36). "Tr." refers to the transcript of the proceedings in the district court.

[2] By Act of March 2, 1917, 39 Stat. 969, 976, Congress "authorized and directed" the Secretary of the Interior to proceed with the allotment of the Agua Caliente Lands under the General Allotment Act as amended. *Arenas* v. *United States*, 322 U.S. 419, 421. See also Tr. 172-173.

Although individual allotments have been made, none of the allottees have received title in fee and the alloted lands remain part of the reservation and in trust under language identical in all material respects to the language of the original trust (Tr. 21-23; 25 U.S.C. 348).

2. No claim has been made by respondents that the land itself, as opposed to its use by lessees, is subject to state taxation. Indeed, as to the allotted land, this Court has interpreted identical trust language in combination, as here, with the language of the General Allotment Act as conferring a statutory tax exemption. *Squire* v. *Capoeman*, 351 U. S. 1. In that case the treaty required the government at the end of the trust to transfer the fee "free of all charge or incumbrance whatsoever." *Id.* at 6. This Court noted "the general words 'charge or incumbrance' might well be sufficient to include taxation." *Id.* at 7. The Court concluded that the proviso in the General Allotment Act (25 U.S.C. 349) allowing taxation after a grant of fee ownership constitutes a "congressional exemption from tax" until fee ownership is granted (351 U. S. at 10).

As to unallotted tribal lands, immunity from state taxation was established in *The Kansas Indians*, 5 Wall. 737, and *The New York Indians*, 5 Wall. 761. In *The Kansas Indians*, this Court stated (at 756) " 'but until they are clothed with the rights and bound to all the duties of citizens', they enjoy the privilege of total immunity from State Taxation." Though this immunity may no longer be total, tribal lands them-

selves are still immune from state taxation in the absence of a federal statute removing the immunity. See *Oklahoma Tax Commission* v. *Texas Co.*, 336 U. S. 342, 366-367.[3] As a corollary, the Indians themselves have a limited right of self-government within the reservation, including the power to tax. See *Buster* v. *Wright*, 135 Fed. 947 (C.A. 8); Tr. 184-186. The limitation on State taxation within reservations is summarized by Cohen as follows:[4]

> "* * * State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress. Conversely Indian property outside an Indian reservation is subject to State taxation unless congressional authority for a claim of tax exemption can be found. * * *"

In 1953, Congress extended to the States certain civil and criminal jurisdiction over Indian tribes but stated specifically that nothing in the conferral of

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[3] See also Cohen, *Federal Indian Law*, 2d Edition 1958, published under the supervision of the Solicitor of the Department of the Interior, at 850: "Lands which are occupied by a tribe or tribes of Indians have always been regarded as not within the jurisdiction of the State for purposes of State property taxation."

[4] Cohen, *supra*, at 845-846, citing *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 651. This is in contrast to federal taxation in which tax coverage is assumed unless a particular exemption can be found. See *Squire* v. *Capoeman*, *supra*.

jurisdiction "shall authorize the alienation, encumbrance, or taxation of any real or personal property * * * belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States".[5]

3. Although the issue arises in the present case in a novel setting, the problem is one which has been settled by decisions of this Court. When legal questions are close and difficult, it is understandable that efforts should be made to raise them anew. And there are times when even questions which have been settled for a long time should be subject to reexamination. This does not appear to be such a case.

4. Beginning with *McCulloch* v. *Maryland*, 4 Wheaton 316, and through *Collector* v. *Day*, 11 Wall. 113, there developed an extensive law of intergovernmental immunity in the tax field. Though *McCulloch* v. *Maryland* was concerned with a discriminatory tax, *Collector* v. *Day* involved the ordinary income tax applicable to all persons. Consistently with these decisions, the Court decided that Congress could not impose a nondiscriminatory income tax on interest derived from state and municipal bonds (*Pollock* v. *Farmers' Loan and Trust Co.*, 157 U.S. 429), and, under a different principle, that salaries of federal judges could not be subjected to nondiscriminatory federal income tax. *Evans* v. *Gore*, 253 U.S. 245. Numerous other decisions proceeded along these lines.

In particular, the Court applied this approach to Indian lands, held in trust by the United States, on

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[5] 28 U.S.C. 1360(b); 18 U.S.C. 1162.

the ground that these were instrumentalities of the United States, immune from state taxation. Thus, in *Choctaw & Gulf R. R.* v. *Harrison*, 235 U.S. 292, the Court struck down a gross production tax on oil and gas, as applied to a lessee of restricted Indian lands. Then it held that the lessee itself was a federal instrumentality and not subject to state taxation. *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U.S. 522. Then in *Gillespie* v. *Oklahoma*, 257 U.S. 501, a tax upon the net income of the lessee, derived from sale of his share of the oil produced on restricted Indian lands, was also held invalid.

5. This trend began to change some 45 years ago, shortly after the accession of Mr. Justice Stone to the bench. A new approach was exemplified in *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, where it was held that fees paid by a state to an independent contractor were subject to nondiscriminatory federal income tax. This tendency continued, and gathered strength, over the following years. In *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, *Collector* v. *Day* was overruled. And in *O'Malley* v. *Woodrough*, 307 U.S. 277, *Evans* v. *Gore* was overruled.

6. A similar development occurred with respect to taxation of the avails from Indian lands. In 1938, the Court decided *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376, in an opinion by Chief Justice Hughes. It held that the federal income tax could constitutionally be applied to income derived by the lessee of state school lands. In reaching this result, *Gillespie* v. *Oklahoma*, was overruled, along with the Court's then re-

cent decision in *Burnet* v. *Coronado Oil and Gas Co.*, 285 U.S. 393.

It is obvious that the burden of the federal tax involved in the *Mountain Producers* case fell, in considerable measure, on the state. If the lessee had been immune from federal taxation (as this Court had held in *Burnet* v. *Coronado Oil & Gas Co.*), competition would undoubtedly have produced a higher return to the state from the lease. Thus, the basic underlying constitutional question in the present case was determined by this Court more than 30 years ago in the *Mountain Producers* case.

7. There have been further decisions which show that the Court has already decided the question raised here, as the court below concluded. The most significant is *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342. The Court there held that a lessee of mineral rights in restricted Indian lands was not immune under the federal Constitution from nondiscriminatory state gross production taxes, and state excise taxes on petroleum produced from these Indian lands.[6] In reaching this result, the Court said (336 U.S. at 353): "These cases present no question concerning the immunity of the Indian lands themselves from state taxation. There is no possibility that ulti-

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[6] *Helvering* v. *Mountain Producers Corp.*, *supra*, was found to be controlling, and a considerable line of cases were overruled. These were *Choctaw & Gulf R. R.* v. *Harrison*, 235 U.S. 292; *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U.S. 522; *Howard* v. *Gypsy Oil Co.*, 247 U.S. 503; *Large Oil Co.* v. *Howard*, 248 U.S. 549, and *Oklahoma* v. *Barnsdall Refineries*, 296 U.S. 521.

mate liability for the taxes may fall upon the owner of the land." [7]

8. It is not without significance, we think, that though *Oklahoma Tax Commission* v. *Texas Co.* involved a state tax, an extensive brief *amicus curiae* was filed by the United States, through Solicitor General Perlman, in which it was urged that the power of the state to tax should be upheld, with respect to both constitutional and statutory objections.[8]

With respect to the constitutional question, Solicitor General Perlman urged that "No Constitutional Immunity Exists," on grounds essentially the same as those adopted by the Court (Br. 7-29). Solicitor General Perlman also urged, with respect to statutory provisions essentially the same as those involved here, that "No Statutory Immunity Has Been Created" (Br. 29-40). On this point, the brief quoted this

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[7] It is on this ground that *Squire* v. *Capoeman*, 351 U.S. 1, may perhaps be best explained. In that case, this Court held, on statutory grounds, that the proceeds of sale of timber on Indian lands were not subject to the federal income tax on capital gains. In that case, the government held the land as trustee for Indians and the taxpayers before the Court were "full-blood, noncompetent Quinaielt Indians," 351 U.S. at 3. The Court found that the land "was of little value after the timber was cut" (351 U.S. at 4), and concluded that "imposition of the tax here in question [on the Indians] is inconsistent with the Government's promise to transfer the fee 'free of all charge or incumbrance whatsoever.' " 351 U.S. at 6. In the present case, no tax is imposed on the Indians, and the land owned by the Indians is not subject to any charge or encumbrance.

[8] See Brief for the United States as Amicus Curiae, in *Oklahoma Tax Commission* v. *Texas Co.*, Nos. 40 and 41, October Term, 1948, available in the library of the Court.

Court's statement in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 604, that "The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication." This Court accepted this contention and concluded that there was no statutory exemption. It said: "Congress' silence prior to the *Mountain Producers* decision did not preclude this Court from curtailing the lessee's immunity in that case; and Congress seems to have accepted that decision with equanimity." *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. at 367.

There is no doubt that Congress has the power to exempt lessees of Indian lands from taxes, including the sort of taxes involved in this case. This was recognized in Solicitor General Perlman's brief (Br. 30) and in the Court's opinion (336 U.S. at 365-366). See also *United States* v. *City of Detroit*, 355 U.S. 466, 474-475. But more than 22 years have passed since this Court's decision in *Oklahoma Tax Commission* v. *Texas Co.*, "and Congress seems to have accepted that decision with equanimity."[9] There is no

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[9] Reference may be made to 28 U.S.C. 1360, which was most recently amended in 1958. This provides that "[n]othing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian, or Indian tribe * * *." This clearly does not grant a tax exemption. It neither adds to, nor subtracts from whatever may otherwise be the state's capacity to tax. Similarly, Public Law 86-339, 73 Stat. 602, 604, Section 5, is inapplicable, since by its terms, it provides exemption only from "inheritance, estate, legacy, or succession taxes."

express exemption of leases in this situation, and no sound basis for implying one.

9. These battles were fought out fully nearly a generation ago. As indicated, the ultimate resolution remains within the power of Congress. It is, of course, true that no decision of this Court stands above this Court's power to reconsider, and the history of the Court shows many instances where old and well-established decisions have been reconsidered and overruled. Cf. *Erie Railroad* v. *Tompkins*, 304 U.S. 64; *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, overruling *The Harrisburg*, 119 U.S. 199. Determining the occasions for such action is one of the highest aspects of the judicial function. This is not such an occasion. Here, the basic question has been determined, in cases such as *Oklahoma Tax Commission* v. *Texas Co.*, *supra*, and *United States* v. *City of Detroit*, 355 U.S. 466. Those decisions were reached in the light of developments which had occurred over a period of more than 20 years. As this Court said, speaking through Mr. Justice Black, in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 610:

> Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, permitted states to impose income taxes upon government employees, and *Helvering* v. *Gerhardt*, 304 U.S. 405, permitted the federal government to impose taxes on state employees. *O'Malley* v. *Woodrough*, 307 U.S. 277, overruled a previous decision which

held that judges should not pay taxes just as other citizens, and *Helvering* v. *Mountain Producers Corp.*, *supra*, repudiated former decisions seriously limiting state and federal power to tax. See also *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, and *James* v. *Dravo Contracting Co.*, 302 U.S. 134. The trend of these cases should not now be reversed.

10. It is surely true that the country has a great responsibility with respect to the Indians. No issue as to the existence of that responsibility is presented by this case.

The question here is simply how the cost of meeting that responsibility shall be shared, recognizing always the overriding power of Congress to make that determination in accordance with its judgment. If the petitioners' contentions here were to prevail, there would probably be some immediate economic gain to the Agua Caliente Indians. This would come at the expense of local taxpayers, the people of Riverside County and the State of California. The lessees here attract guests who use the highways; they have employees whose children use the schools; they present public health problems, and require fire and police protection, all of which come basically as a local charge. There is no reason, either constitutional or statutory, why the lessees here should be immune from bearing their normal, nondiscriminatory share of these costs in the absence of a clear provision to that effect by Congress. The fact that this may have economic impact on the Agua Caliente Indians has been determined by this Court to be without constitutional or

statutory significance, in the *Mountain Producers* and in the *Oklahoma Tax Commission* cases.

If further aid for the Indians is needed this should be a national responsibility, and should be provided by Congress, in whatever way Congress thinks appropriate or desirable. There is no occasion now for this Court to reexamine the conclusions which it has reached in this area, after extensive consideration in *Mountain Producers*, *Oklahoma Tax Commission*, and in many other cases. For, as the Court pointed out in *United States* v. *City of Detroit*, *supra*, 355 U.S. at 474:

> Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

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